

could serve another useful purpose, by quickly identifying for the staff and defendant carrier the relevant statutory provisions and any associated statutory time constraints.¹⁴²

b. Comments

52. The commenters generally support the proposal to require parties to serve complaints simultaneously on defendants, the Office of the Secretary, and the Bureau responsible for processing the complaint.¹⁴³ BellSouth, GTE, and CBT, however, are concerned that defendants may be required to respond to deficient complaints if the Commission eliminates its practice of reviewing complaints prior to serving them on defendants.¹⁴⁴ By contrast, MCI argues that Commission review of a complaint is unnecessary because a defendant would undoubtedly raise the issue if a complaint was deficient.¹⁴⁵ CompTel suggests that the Commission send the defendant a notice of receipt of the complaint to safeguard against faulty service.¹⁴⁶ BellSouth states that Section 208(a) mandates that only the Commission may serve complaints on defendants, and suggests that the complainant serve the defendant with a copy of the complaint and notice of intent to file prior to the filing of the complaint with the Commission.¹⁴⁷ AT&T and NYNEX state that, while Section 208(a) does require the Commission to serve complaints on defendants, this requirement is fulfilled by allowing complainants to serve complaints on defendants as agents of the Commission for that limited purpose only.¹⁴⁸ PTG asks the Commission to clarify that personal service is required for the complaint.¹⁴⁹

53. Almost all of the commenters, including ATSI, BellSouth, CBT, CompTel, GST, GTE, KMC, MFS, and TRA, support the proposal to require complainants to submit a completed checklist or "intake" form with each copy of the formal complaint.¹⁵⁰ ATSI stated that using "check-off boxes" to clearly indicate the specific complaint category utilized would assist all parties and the Commission in determining quickly the special standards and applicable deadlines.¹⁵¹ BellSouth additionally suggests that

¹⁴² Notice at 20837-38.

¹⁴³ See, e.g., ACTA Comments at 1-2; ATSI Comments at 8; GST Comments at 4; ICG Comments at 11; KMC Comments at 4-6; MCI Comments at 11-12; NYNEX Comments at 4-5; PTG Comments at 6-7; SWBT Comments at 2-3.

¹⁴⁴ BellSouth Comments at 9; GTE Comments at 34; CBT Comments at 6.

¹⁴⁵ MCI Comments at 12.

¹⁴⁶ CompTel Comments at 5.

¹⁴⁷ BellSouth Comments at 10.

¹⁴⁸ AT&T Comments at 21; NYNEX Comments at 4-5.

¹⁴⁹ PTG Comments at 6-7.

¹⁵⁰ ATSI Comments at 8; BellSouth Comments at 9; CBT Comments at 7; CompTel Comments at 5; GST Comments at 5; KMC Comments at 5; TRA Comments at 12.

¹⁵¹ ATSI Comments at 8.

the form include a waiver of the Section 271(d)(6)(B) 90-day resolution deadline.¹⁵² MCI argues that this form would be useless because a party filing a defective complaint would be unlikely to complete this form correctly.¹⁵³

c. Discussion

54. We conclude that complainants shall be required to effect personal service¹⁵⁴ of the complaint¹⁵⁵ on the defendant carrier/designated agent simultaneously with the filing of the complaint with the Commission's Secretary, the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint, and the Mellon Bank.¹⁵⁶ The complainant shall serve two copies of the complaint with the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint.¹⁵⁷ The Chief will then forward one of those copies to the defendant, in compliance with the mandate in Section 208(a) that complaints "shall be forwarded by the Commission" to the defendant.¹⁵⁸ The allowable time period for filing an answer begins to run on the date the complainant serves the complaint on the defendant. Because the Common Carrier Bureau coordinates with the International Bureau to handle international telecommunications complaints, any formal complaint that is filed with the International Bureau must also be filed

¹⁵² BellSouth Comments at 10.

¹⁵³ MCI Comments at 11.

¹⁵⁴ Personal service requires that the complainant serve the complaint by hand delivery on one of the defendant carrier's registered agents for service of process. *See* Appendix A, § 1.735(d).

¹⁵⁵ We clarify that all references to the complaint include the complaint and all supporting documentation that is required to be filed with the complaint.

¹⁵⁶ *See* Appendix A, § 1.735(b), (d).

¹⁵⁷ Commission rule 1.735(b)(2)-(4), adopted in this Report and Order, provides as follows:

(2) If the complaint is filed against a carrier concerning matters within the responsibility of the Common Carrier Bureau (*see* 47 C.F.R. § 0.291), serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau;

(3) If the complaint is filed against a wireless telecommunications carrier concerning matters within the responsibility of the Wireless Telecommunications Bureau (*see* 47 C.F.R. § 0.331), serve two copies on the Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau;

(4) If the complaint is filed against a carrier concerning matters within the responsibility of the International Bureau (*see* 47 C.F.R. § 0.261), serve a copy on the Chief, Telecommunications Division, International Bureau, and serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau.

See Appendix A, § 1.735(b)(2)-(4).

¹⁵⁸ *See* Appendix A, § 1.735(e).

simultaneously with the Chief, Formal Complaints Branch, Enforcement Division, Common Carrier Bureau.¹⁵⁹ Requiring service of the complaint on the defendant carrier simultaneously with filing the complaint with the Commission will enable the parties and the Commission to begin prompt resolution of the complaint, by eliminating delays that existed under the former rules. This requirement satisfies the Commission's goal of expediting the processing of formal complaints.

55. After consideration of commenters' concerns regarding notice to the defendant in the event of defective service of the complaint, we conclude that the Commission will send each defendant notice of receipt of the complaint as a precaution against defective service. Upon receipt of the complaint, the Commission shall promptly send notice of receipt of the complaint by facsimile transmission to the defendant.¹⁶⁰ In addition to mailing a copy of the complaint to the defendant, the staff will send to all parties a schedule detailing the date the answer is due and the date of the initial status conference.¹⁶¹ The date of service of the formal complaint upon the defendant shall be presumed to be the same date as service on the Commission. Where, however, a complainant fails to properly serve the complaint on the defendant, the complaint will be dismissed without prejudice.

56. We further conclude that the complainant must file the complaint, along with the appropriate fee, with the Mellon Bank on the same day that it serves the complaint on the Commission and the defendant.¹⁶² Although this requirement was not specifically proposed in the *Notice*, we find that requiring the complaint to be filed with the Mellon Bank on the same day as service on the defendant and the Commission is a natural extension of the proposal in the *Notice* to require simultaneous service of the complaint on the defendant and the Commission. Such requirement is further justified by the fact that the date on which the complaint is filed with the Mellon Bank is the official commencement date of the complaint with the Commission. Thus, the date on which the complaint is filed with the Mellon Bank is the date on which any statutory deadlines begin to run and timely prosecution of such complaints requires service on the defendant at the earliest date possible. Additionally, requiring delivery of the complaint and fee payment to the Mellon Bank by the day of service of the complaint on the Commission and defendant will help the Commission to determine quickly whether the fee has been properly paid. We also require the complainant to attach to each copy of the intake form, a photocopy of its fee payment (check, etc.) as well as a certificate of service.¹⁶³ Attachment of a copy of the fee payment will provide some assurance to the Commission and a defendant that payment was made. Where a fee is not properly paid, the Commission will notify both parties promptly that the complaint has been dismissed without prejudice.

57. BellSouth, GTE, and CBT raise some valid concerns about the possibility of defendants having to respond to deficient complaints under our new service requirements. To address these concerns, we require a complainant to submit a completed intake form with its formal complaint to indicate that the

¹⁵⁹ See Appendix A, § 1.735(b).

¹⁶⁰ See Appendix A, § 1.735(e).

¹⁶¹ See Appendix A, § 1.735(e).

¹⁶² See Appendix A, § 1.735(b).

¹⁶³ See Appendix A, §§ 1.721(a)(13), (a)(14). 28

complaint satisfies the procedural and substantive requirements under the Act and our rules.¹⁶⁴ The completed intake form shall identify all relevant statutory provisions, any relevant procedural history of the case, and, in the case of a Section 271(d)(6)(B) complaint, whether the complainant desires to waive the ninety-day resolution deadline.¹⁶⁵ We disagree with MCI's assertion that a complainant who files a defective complaint will probably be unable to fill out the intake form properly. Rather, we find that the intake form will serve as a checklist to guide complainants who may be unfamiliar with the necessary components of a formal complaint and in that way reduce the number of defective complaints filed. We conclude further that this requirement will permit the Commission to eliminate the delay associated with the initial review of a complaint. To the extent that frivolous complaints are filed, the intake form requirement will assist in weeding out such complaints prior to Commission review. The form will identify for the Commission staff any relevant statutory provisions and associated deadlines.¹⁶⁶ Furthermore, the staff will be alerted if there is relevant procedural history that will require review of related non-Commission records by the staff. We note that a defendant is not relieved of its obligation to file and serve its answer on time by the fact that a complainant failed to correctly complete the intake form.

58. In addition, we reject NAD's proposal to permit service of complaints by facsimile transmission because we conclude that service of the complaint must be accomplished in the most reliable manner possible. Because we are requiring the defendant to submit its answer within twenty days of receipt of the complaint, any delay or uncertainty in the receipt of the complaint and associated documents through facsimile transmission could unduly infringe on the defendant's due process rights.

2. Expediting Service Generally

a. The Notice

59. In the *Notice*, we proposed to require service of all documents filed subsequent to the complaint (answer, motions, briefs, etc.) by overnight delivery.¹⁶⁷ Alternatively, parties would be permitted to serve pleadings by facsimile transmission, to be followed by hard copies sent by regular mail delivery.¹⁶⁸

60. We further proposed to establish and maintain an electronic directory, available on the Internet, of agents authorized to receive service of complaints on behalf of carriers that are subject to the provisions of the Act and of the relevant Commission personnel who must be served.¹⁶⁹ We noted that

¹⁶⁴ See Appendix A, § 1.721(a)(12). A copy of the complaint intake form is included in Exhibit B to this Report and Order.

¹⁶⁵ See Appendix B, FCC Form 485.

¹⁶⁶ See Appendix B, FCC Form 485.

¹⁶⁷ *Notice* at 20838.

¹⁶⁸ *Notice* at 20838.

¹⁶⁹ *Notice* at 20836-37.

Section 413 of the Act requires all carriers subject to the Act to designate in writing an agent in the District of Columbia for service of all process.¹⁷⁰ The proposed directory would list, in addition to the name and address of the agent, at least one of the following: his or her telephone or voice-mail number, facsimile number, or Internet e-mail address.¹⁷¹ We sought comment on this proposal and on what information should be included within the service directory.¹⁷²

61. Finally, we recognized that the practice of routing formal complaints against wireless telecommunications providers was unwieldy and time-consuming. We noted that under the current rules, wireless complaints are routed from the Common Carrier Bureau lock box at the Mellon Bank in Pittsburgh to the Commission's Secretary, who forwards the complaint to the Formal Complaints and Investigations Branch of the Common Carrier Bureau's Enforcement Division, which then reviews and forwards the complaints to the Wireless Telecommunications Bureau.¹⁷³ Therefore, we sought comment on our proposal to revise our rules to provide for a separate lock box at the Mellon Bank for the receipt of complaints against wireless telecommunications service providers.¹⁷⁴

b. Comments

62. Commenters strongly support these proposals.¹⁷⁵ BellSouth suggests that facsimile service would be facilitated by requiring pleading signature blocks to include facsimile and phone numbers.¹⁷⁶ SWBT additionally suggests that service include delivery by certified mail.¹⁷⁷ ICG argues that service should be by hand delivery or overnight mail only.¹⁷⁸ GST, KMC, MFS, and NAD suggest permitting service by Internet, with NAD particularly encouraging Internet or facsimile service of complaints and related documents to facilitate service by consumers with disabilities.¹⁷⁹ CBT opposes service by Internet because of technical difficulties and problems with verification.¹⁸⁰ CBT asks the Commission to clarify that it will take responsibility for updating the electronic directory and make allowances for improper

¹⁷⁰ Notice at 20836-37.

¹⁷¹ Notice at 20836-37.

¹⁷² Notice at 20836-37.

¹⁷³ Notice at 20835-36.

¹⁷⁴ Notice at 20835-36. See 47 C.F.R. § 1.1105 (1)(c).

¹⁷⁵ See, e.g., ACTA Comments at 3-4; AT&T Comments at 4; NYNEX Comments at 4-5; USTA Comments at 6.

¹⁷⁶ BellSouth Comments at 11.

¹⁷⁷ SWBT Comments at 2-3.

¹⁷⁸ ICG Comments at 11.

¹⁷⁹ GST Comments at 5; KMC Comments at 5; MFS Comments at 5; NAD Reply at 5.

¹⁸⁰ CBT Comments at 7.

service due to mistakes in the directory.¹⁸¹ ACTA suggests that carriers be able to designate someone other than an agent located in the District of Columbia for receipt of service, arguing that limiting service to what in many cases will be an "artificial agent" in the District of Columbia is inefficient in light of the availability of national overnight delivery.¹⁸² MCI suggests that a paper directory of service agents be kept in the Secretary's office for those parties lacking Internet access.¹⁸³

c. Discussion

63. We conclude that parties must serve documents or pleadings filed subsequent to the complaint by either hand delivery, overnight delivery, or facsimile transmission followed by mail delivery.¹⁸⁴ Any facsimile transmission or hand delivery must be completed by 5:30 p.m., local time of the recipient, in order to be considered served on the date of receipt.¹⁸⁵ Service by overnight delivery will be deemed served the business day following the date it is accepted for overnight delivery by a reputable overnight delivery service.¹⁸⁶ Although we are permitting service of pleadings subsequent to the complaint to be by facsimile transmission, we also require that facsimile service be accompanied by mailed hard copies to alleviate the effects of possible faulty facsimile transmission. These requirements will ensure timely and verifiable service. To facilitate facsimile delivery, we require pleading signature blocks to include facsimile and telephone numbers, as suggested by Bellsouth.¹⁸⁷

64. We decline to authorize service by Internet at this time because we have received insufficient comments on the issue, given the significance of permitting electronic filing or service of complaint pleadings. We may revisit this issue at a later date, following our consideration of possible procedures for the electronic filing of documents in rulemaking proceedings in GC Docket 97-113.¹⁸⁸

65. We also reject SWBT's proposal to deliver pleadings by certified mail. Although SWBT presumably offered this suggestion to improve verification of service rather than speed of service, we did not seek comment on verification procedures in the *Notice* because we have not found verification of service to be a significant problem.

¹⁸¹ CBT Comments at 7.

¹⁸² ACTA Comments at 3-4.

¹⁸³ MCI Comments at 11-12.

¹⁸⁴ See Appendix A, § 1.735(f).

¹⁸⁵ See Appendix A, § 1.735(f)(3).

¹⁸⁶ See Appendix A, § 1.735(f)(2).

¹⁸⁷ See Appendix A, § 1.720(j).

¹⁸⁸ See *Electronic Filing of Documents in Rulemaking Proceedings*, Notice of Proposed Rulemaking, 12 FCC Rcd 5150 (1997).

66. Although we considered establishing an electronic directory of agents designated by carriers to receive service of process, we decline to establish such a directory at this time.¹⁸⁹ We have concluded that more review is needed to determine the most efficient means for collecting the data necessary to establish such a directory. This data collection may be combined with other collections of data from common carriers by the Commission in the future. The Commission intends to reconsider this issue in conjunction with streamlining its other data collection procedures.

67. We recognize the need to provide complainants with the information necessary to effect personal service on defendant carriers as required by our rules.¹⁹⁰ Accordingly, the Commission will provide access to a listing of agents designated by carriers to receive service of process in the Office of the Commission Secretary. In order to establish this listing, all common carriers are required to designate service agents within the District of Columbia, although they may additionally identify an alternative service agent outside the District of Columbia.¹⁹¹ For each designated agent for service of process, each carrier is required to identify its name, address, telephone or voice-mail number, facsimile number, and Internet e-mail address if available.¹⁹² In addition, the carrier shall identify any other names by which it is known or under which it does business, and, if the carrier is an affiliated company, its parent, holding, or management company.¹⁹³ This information shall be provided to the Commission by filing it with the Formal Complaints and Investigations Branch of the Common Carrier Bureau.¹⁹⁴ Parties are required to notify the Commission within one week of any changes in their information. We note that ACTA's proposal to permit designation of service agents outside of the District of Columbia was based on the incorrect premise that overnight delivery would fulfill our requirement of having the complainant personally serve the complaint on the defendant. It will not. Only hand delivery constitutes personal service for the purposes of our service requirement. We note, however, that the complainant is not required to hand deliver the complaint to the Commission Secretary, the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint, or the Mellon Bank.

68. We establish a separate lock box at the Mellon Bank in Pittsburgh for the receipt of complaints against wireless telecommunications service providers.¹⁹⁵ Currently, all formal complaints

¹⁸⁹ See Appendix A, § 1.47(h).

¹⁹⁰ See Appendix A, § 1.735(d).

¹⁹¹ See Appendix A, § 1.47(h). We note that common carriers are required by Section 413 of the Act to provide this information to the Commission. 47 U.S.C. § 413.

¹⁹² See Appendix A, § 1.47(h).

¹⁹³ See Appendix A, § 1.47(h).

¹⁹⁴ We encourage common carrier trade associations, such as ACTA, CompTel, TRA, and USTA, to file this information on behalf of their members if they so desire. The Commission would consider such group submissions full compliance with this requirement and would appreciate receiving such submissions both in hard copy and on a computer disk.

¹⁹⁵ See Appendix A, § 1.1105(1)(d).

against common carriers, including Wireless Telecommunications Bureau complaints and International Bureau complaints, are filed in the lockbox of the Common Carrier Bureau at the Mellon Bank. Because the Common Carrier Bureau coordinates with the International Bureau to handle international telecommunications complaints, filing the International Bureau's complaints in the Common Carrier Bureau's lockbox does not delay the complaint process. Providing the Wireless Telecommunications Bureau with its own lockbox, however, will both expedite the delivery of the complaint and verification of fee payment to the Wireless Telecommunications Bureau, and relieve the Common Carrier Bureau of the responsibility of reviewing wireless complaints for routing to the Wireless Telecommunications Bureau.

E. Format and Content Requirements

69. The short resolution deadlines contained in the Act place greater burdens on parties to provide facts and legal arguments in their respective complaints and answers to support or defend against allegations of misconduct by common carriers. Similarly, the short resolution deadlines place greater demands on the Commission and its staff to expedite the review and disposition of these complaints.

70. The Commission's rules have always required fact-based pleadings. That is, all complaints, answers and related pleadings are required to contain complete statements of fact, supported by relevant documentation and affidavits.¹⁹⁶ In actual practice, however, many parties file what amount to "notice" pleadings similar to filings that would be made in federal district court. Both complainants and defendants have placed substantial reliance on self-executing discovery and additional briefing opportunities to present their respective claims and defenses to the Commission.

71. A principal goal of this rulemaking that was set forth in the *Notice* was to improve the utility and content of the complaint and answer by requiring complainants and defendants to exercise diligence in compiling and submitting full legal and factual support in their initial filings with the Commission. The proposals in the *Notice* were designed to promote fact-based pleadings and to shift the focus of fact-finding away from costly, time-consuming discovery and towards the pre-filing and initial complaint and answer periods.

1. Support and Documentation of Pleadings

a. The Notice

72. In the *Notice*, we proposed to require that any party to a formal complaint proceeding must, in its complaint, answer, or any other pleading required during the complaint process, include full statements of relevant facts and attach to such pleadings supporting documentation and affidavits of persons attesting to the accuracy of the facts stated in the pleadings.¹⁹⁷ This would effectively prohibit defendants from making general denials in their answers. We proposed to require a complainant to append to its complaint documents and other materials to support the underlying allegations and requests for relief, and tentatively concluded that failure to append such documentation would result in summary dismissal

¹⁹⁶ See 47 C.F.R. §§ 1.720(b), (c).

¹⁹⁷ *Notice* at 20839.

of the complaint.¹⁹⁸ Although our rules already required each complainant to provide a complete statement of the facts and description of the nature of the alleged violation, we tentatively concluded that we should require more specifically that a complainant include a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question in the formal complaint.¹⁹⁹ Such a rule, for example, would require a complainant alleging that a BOC has ceased to meet any of the conditions that were required for approval to provide interLATA services pursuant to Section 271(c)(2)(B) of the Act²⁰⁰ to include in its complaint a detailed explanation of the manner in which the defendant BOC has ceased to meet such condition or conditions, along with any associated documentation.²⁰¹ The *Notice* also sought comment on whether we should prohibit complaints that rely solely on assertions based on "information and belief." We stated that, while assertions based on information and belief may not be useful in deciding on the merits of a complaint, prohibiting such assertions might inhibit a complainant's ability to present claims of unlawful behavior against carriers under applicable provisions of the Act.²⁰²

73. We proposed to require the complaint, answer, and any authorized reply include two sets of additional information: (1) the name, address, and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information; and (2) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings.²⁰³ We noted that this proposal, which would enable the Commission and parties to identify quickly sources of information, comported with an analogous requirement under the Federal Rules of Civil Procedure.²⁰⁴ We also sought comment on what benefits, if any, would be realized by the parties or the Commission by requiring the identified relevant documents to be filed with the Commission along with the complaint and answers.²⁰⁵

74. The *Notice* proposed to require parties to append copies of relevant tariffs or tariff provisions to their complaints, answers, and replies, noting that the current rules only encourage parties to append such tariffs.²⁰⁶ The *Notice* also proposed to modify the rules to include expressly pleadings filed solely to effect delay in the prosecution or disposition of a complaint as filings for improper purpose within the meaning of Section 1.734 of our rules.²⁰⁷

¹⁹⁸ *Notice* at 20839.

¹⁹⁹ *Notice* at 20839-40.

²⁰⁰ See 47 U.S.C. § 271(c)(2)(B).

²⁰¹ See Appendix A, § 1.721(a)(5).

²⁰² *Notice* at 20839.

²⁰³ *Notice* at 20840-41.

²⁰⁴ See Fed. R. Civ. P. 26(a)(1)(A), (B).

²⁰⁵ *Notice* at 20845.

²⁰⁶ *Notice* at 20841; cf. 47 C.F.R. § 1.720(h) (encourages parties to provide copies of relevant tariffs).

²⁰⁷ *Notice* at 20842.

b. Comments

75. Most commenters, including AT&T, BellSouth and TRA, strongly support the proposals to require all pleadings to include complete facts and documentation.²⁰⁸ AT&T states that supporting affidavits and documentation are "critical to understanding the parties' positions on the matters at issue."²⁰⁹ NYNEX agrees with the observation in the *Notice* that "[t]ypically, complainants file 'bare bones' complaints with numerous allegations, but with little or no documentation" and that the proposal would allow the Commission to "process complaints more quickly, since it would have access to the relevant information from the beginning[.]"²¹⁰ BellSouth suggests that the Commission impose requirements similar to its rules for pole attachment complaints which require detailed, fact-based complaints, supported by extensive documentation and verifications detailing the alleged violations.²¹¹

76. Several commenters, including CBT, NYNEX, and PTG, only support our proposals regarding complaints, and oppose our proposals regarding answers.²¹² They state that the format and content proposals for complaints are not overly burdensome because complainants control the timing of the filing of the complaint and can gather information prior to bringing the complaint.²¹³ They oppose the format and content proposals with regard to answers, however, because they argue that the requirements will be too onerous for defendants who will have little time to respond with such specificity in their answers, especially in light of our proposal to reduce the time to file answers to twenty days.²¹⁴

77. AT&T agrees that general denials should be prohibited.²¹⁵ MCI, however, contends that general denials should be permitted where a complainant has been uncooperative with the defendant prior to the filing of the complaint and the defendant lacks the necessary information upon which to respond to the complaint in detail.²¹⁶ The cable entities state that general denials should be permitted in accordance with the Federal Rules of Civil Procedure ("FRCP"), subject to Rule 11 sanctions,²¹⁷ if the party intends in good faith to controvert all the averments of a pleading or specific paragraph.²¹⁸

²⁰⁸ See, e.g., AT&T Comments at 5-6; BellSouth Comments at 12; TRA Comments at 13.

²⁰⁹ AT&T Comments at 5-6.

²¹⁰ NYNEX Comments at 5-6.

²¹¹ BellSouth Comments at 1-2.

²¹² CBT Comments at 8-9; NYNEX Comments at 6-8; PTG Comments at 8-10.

²¹³ CBT Comments at 8-9; NYNEX Comments at 6-8; PTG Comments at 8-10.

²¹⁴ CBT Comments at 8-9; NYNEX Comments at 6-8; PTG Comments at 8-10.

²¹⁵ AT&T Comments at 11.

²¹⁶ MCI Comments at 17.

²¹⁷ Fed. R. Civ. Proc. Rule 11.

²¹⁸ Cable Entities Joint Reply at 8.

78. AT&T and PTG endorse the proposal to prohibit assertions based solely on information and belief, stating that it would help to reduce the number of frivolous complaints, including those brought to harass defendants or as fishing expeditions.²¹⁹ Many commenters, however, including APCC, Bell Atlantic, CompTel, MCI, NYNEX, NAD, TRA, and Teleport Communications Group ("TCG"), argue that allowances should be made for situations in which a complainant will have difficulty obtaining access to information that may be in the sole possession of a defendant or third parties who might be unwilling to relinquish such information.²²⁰ APCC, GTE, ICG, and TCG propose that information and belief allegations should be permitted if the complainant pleads with particularity facts that would establish a credible case, or supplies affidavits stating that the necessary information is in the possession of the defendant or an uncooperative third party.²²¹ ATSI, KMC, and MFS oppose the proposal because of the potential hardship on small or emerging businesses.²²² APCC and ICG also seek clarification on whether the Commission's proposal is to prohibit complaints based solely on information and belief, or only those allegations based solely on information and belief.²²³

79. AT&T and PTG note that the identification of individuals with discoverable information should not include phone numbers because such individuals should be contacted only through counsel.²²⁴ Regarding the document production proposal, Bechtel & Cole and Ameritech support requiring all relevant documents to be produced to the opposing party and the Commission.²²⁵ Most commenters, however, such as CBT, BellSouth, MCI, the cable entities, and PTG, express concern that the information produced might be overbroad and argue that requiring the filing of numerous documents with only tangential relevance to the dispute is likely to overwhelm the Commission with materials of marginal or no use in resolving the complaint.²²⁶ CBT notes that many federal courts have opted out of compliance with the federal rule and that it would be more efficient to respond to discovery requests than to identify and gather the universe of available information.²²⁷ MCI questions whether this requirement will be useful, stating that a party would identify as relevant only those documents already attached as documents upon which that party intends to rely and that party would be unable to guess at what materials another party might find

²¹⁹ AT&T Comments at 5 n.4; PTG Comments at 10.

²²⁰ APCC Comments at 4; Bell Atlantic and NYNEX Joint Reply at 4; CompTel Comments at 6; MCI Comments at 12-13; NAD Reply at 3; TRA Comments at 13; and TCG Comments at 3.

²²¹ APCC Comments at 5; GTE Comments at 7; ICG Reply at 8; TCG Comments at 3.

²²² ATSI Comments at 9; KMC Comments at 7; MFS Comments at 6.

²²³ APCC Comments at 5; ICG Comments at 12.

²²⁴ AT&T Comments at 8-9; PTG Comments at 12.

²²⁵ Bechtel & Cole Comments at 3; Ameritech Comments at 2.

²²⁶ CBT Comments at 12; BellSouth Comments at 16; MCI Comments at 21; Cable Entities Reply at 12; PTG Comments at 19.

²²⁷ CBT Comments at 8-9.

relevant.²²⁸ ACTA, BellSouth, and GTE propose requiring parties to file only the documents relied upon concurrently with the complaint and answer and any subsequently filed brief, rather than requiring the production of all potentially relevant documents.²²⁹ GST, KMC, and MFS argue that, to prevent the copying of millions of unnecessary documents, parties should only be required to identify documents and provide the opportunity to copy such documents.²³⁰ AT&T supports the identification or attachment of documents to complaints and answers only with respect to Section 271(d)(6)(B) complaints; otherwise, AT&T argues, all document production should occur at the initial status conference.²³¹ CBT, NYNEX, and SWBT express concern that defendants will not have time to execute document identification and production of this broad scope.²³² Bell Atlantic states that, because the Commission seldom permits depositions or broad document searches, the provision of this information would rarely be utilized.²³³ PTG and USTA suggest that parties be allowed to amend their information designations without leave.²³⁴ Several parties, including MCI, express doubt that such information disclosure requirements could entirely substitute for discovery.²³⁵

80. All commenters who discussed the proposal to require parties to append copies of relevant tariffs or tariff provisions to their complaints, answers, and replies support the proposal.²³⁶ No parties commented on the proposal, to include expressly within the meaning of Section 1.734 of our rules, that pleadings filed solely to effect delay in the prosecution or disposition of a complaint are filings for improper purpose.

²²⁸ MCI Comments at 15.

²²⁹ ACTA Comments at 6; BellSouth Comments at 13; GTE Comments at 10; NYNEX Comments at 10.

²³⁰ GST Comments at 12; KMC Comments at 12; MFS Comments at 12.

²³¹ AT&T Comments at 7-8.

²³² CBT Comments at 8-9; NYNEX Comments at 7; SWBT Comments at 3-4.

²³³ Bell Atlantic Comments at 5.

²³⁴ PTG Comments at 14; USTA Comments at 4.

²³⁵ *See, e.g.*, MCI Reply at 9.

²³⁶ *See, e.g.*, ACTA Comments at 5; AT&T Comments at 5.

c. Discussion

81. We conclude that the complaint, answer, reply, and any other required pleading are required to include full statements of relevant, material facts with supporting affidavits and documentation.²³⁷ This requirement will improve the utility and content of pleadings by requiring parties to plead their cases with specific, material facts and supply documentation early in the complaint process. In order to speed resolution of all formal complaints, the Commission must adhere to the fact-pleading process. Such quick resolution of certain formal complaints is necessitated by the Act. Further, such quick resolution of all formal complaints where possible is consistent with the overall goals of the Act to promote and protect competition in the marketplace.

82. We conclude that complainants shall be required to provide, in their complaints, a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question.²³⁸ Substantive claims, or "counts," based solely upon information and belief shall be generally prohibited.²³⁹ A complainant may be permitted, however, to file claims based on information and belief if such claims are made in good faith and the complainant attaches an affidavit to the complaint that explains why the supporting facts could not be reasonably ascertained.²⁴⁰ Our goal is to discourage complainants from filing claims based solely upon information and belief without firsthand knowledge of the violation alleged. Because quick resolution of formal complaints is essential to the Commission's goal of fostering and preserving competition in today's deregulated telecommunications markets, strict adherence to the Commission's fact pleading requirements is necessary. A general rule prohibiting assertions based solely upon information and belief will ensure that complainants exercise diligence in preparing and submitting allegations of misconduct against a carrier. We have considered, however, commenters' concerns that complainants may not always have in their possession the information that would substantiate their claims and that such information may be in the sole possession or control of the defendant carrier or of uncooperative third parties. Each complainant has the general duty to provide, whenever possible, full statements of fact supported by relevant documentation and affidavits. Complainants should not, however, be penalized or prevented from filing a formal complaint in those situations in which the necessary information could not have been reasonably obtained prior to the filing of the complaint. We conclude that this requirement strikes an equitable balance between the Commission's need for complete information as early as possible, and the complainant's potential difficulty in obtaining that information.

83. We disagree with the comments of the cable entities that defendants should be permitted to make general denials if the defendant intends in good faith to controvert all the averments of a pleading or specific paragraph. Requiring the answer to include full statements of relevant, material facts with

²³⁷ See 47 C.F.R. §§ 1.720(b), (c); Appendix A at §§ 1.721(a)(5), (a)(11); 1.724(b), (g); 1.726(a), (e); 1.727(b). We note that Section 208 of the Act, requiring the complainant to "briefly state the facts" in its complaint, supports our requirement that the complainant set forth facts that would fully support its allegations. 47 C.F.R. § 208(a).

²³⁸ See Appendix A, at § 1.721(a)(5).

²³⁹ See Appendix A, at § 1.721(a)(5).

²⁴⁰ See Appendix A, at § 1.721(a)(5).

supporting affidavits and documentation will prohibit defendants from making general denials in their answers.²⁴¹ Specific denials supported by facts and documentation will aid the Commission staff in understanding the nature of the dispute and facilitate its resolution. Formal complaints often raise questions about a rate, charge, term or condition of a particular service offering. In our staff's experience, defendant carriers have the requisite knowledge to specifically deny a complainant's allegations about such charges, practices or service requirements in the vast majority of cases. A diligent defendant should almost always have sufficient information with which to make specific denials. We conclude further that, contrary to MCI's suggestion, the benefits to speedy resolution of a complaint that arise from specific denials outweigh the potential benefit of allowing general denials as a mechanism to enforce compliance with the pre-filing activities requirements.

84. We conclude that parties must include in the complaint, answer, and any necessary reply, an "information designation" that identifies individuals known or believed by the parties to have knowledge about the matters in dispute. This information designation must identify such individuals by name and business or other address and include a description of the information possessed by that source and its relevance to the dispute.²⁴² We conclude that such mandatory information designation will simplify, expedite, and, in some cases, eliminate the need for time-consuming discovery. We agree with AT&T and PTG that parties should not be required to supply the phone numbers of individuals who should only be contacted through counsel. Therefore parties are required to identify in the complaint, answer, and any necessary reply only the name and address of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings.²⁴³

85. We conclude further that parties shall also be required to identify in their information designations all documents in their possession or control believed to be relevant to the matters in dispute, including an inventory that contains for each document the date, the source, the intended recipient(s), and a description of the document's relevance to the dispute.²⁴⁴ We disagree with MCI's assertion that parties will be unable to guess what kinds of material the opposing party would regard as relevant. In most cases, parties to formal complaints before the Commission are sophisticated business entities who fully understand the issues before them and know which documents in their possession or control are relevant to those issues. We find CBT's arguments that many federal courts have opted out of compliance with this rule's equivalent in the FRCP unpersuasive. We note that, while we looked to the FRCP for some guidance during this proceeding, that guidance was limited by the many differences between federal court proceedings and Commission proceedings. Not only does the Commission require fact-based pleadings, but certain of the Commission's formal complaint proceedings are subject to statutory resolution deadlines shorter than any deadline applicable to the federal courts. Although some federal courts have opted out of compliance with FRCP 26(a)(1), we adopt its equivalent for Commission proceedings because it will aid us greatly in meeting statutory deadlines under our individual procedural constraints as well as in expediting the resolution of competitive issues that affect the telecommunications marketplace.

²⁴¹ See Appendix A, at § 1.724(b).

²⁴² See Appendix A, at §§ 1.721(a)(10); 1.724(f); 1.726(d).

²⁴³ See Appendix A, at §§ 1.721(a)(10); 1.724(f); 1.726(d).

²⁴⁴ See Appendix A, at §§ 1.721(a)(10); 1.724(f); 1.726(d).

86. We disagree with CBT's statement that it would be more efficient to have parties respond to discovery requests than to have parties identify all relevant documents in their information designations. We find that requiring such information designations early in the dispute will facilitate the Commission's ability to focus on the facts and issues in the case quickly. Having such information on hand will further expedite the Commission's consideration of the necessity of any discovery requests early in the proceeding. We also disagree with the suggestions by PTG and USTA to permit parties to amend their information designations without leave. We conclude that this would run contrary to our objective of procuring as much information as early as possible. The allowance of amendments would reduce parties' incentives to file thorough information designations with their complaints, answers, and replies because they will rely on their right to supplement their designations at a later time. Accepting routinely late-obtained information will only delay the resolution of complaints. We do recognize, however, that parties may occasionally, after submitting their initial pleadings, discover information that should be included in their information designations. Accordingly, a party may submit a request for permission to amend its information designations, along with an explanation of why the information was not designated at the time of the filing of the complaint, answer, or reply.

87. We do not find it necessary to require the production or exchange of all documents identified as relevant to a dispute as a matter of course in all cases. It will be helpful and often necessary, however, in light of the Act's complaint resolution deadlines and the Commission's goal of expediting the resolution of all complaints, to have certain documents identified by the parties readily accessible to the staff and opposing parties. Therefore we require parties to file concurrently with the complaint, answer, and any necessary reply, only those documents and affidavits upon which they intend to rely to support their respective claims and defenses.²⁴⁵ Required attachments include relevant tariffs or tariff provisions where applicable.²⁴⁶ Because it is in each party's self-interest to support its most persuasive arguments, we conclude that it is reasonable to rely on each party's judgment to identify the key documents in the dispute. We acknowledge that a party may be reluctant to divulge information that would weaken its case, and, therefore, would probably not attach such information to its complaint, answer, or reply. We conclude that this concern can be adequately addressed by requiring each party to identify all such information in their information designations, however, and opposing parties will therefore be aware of, and have subsequent opportunity to request, such information at the initial status conference.²⁴⁷

88. We conclude that each party shall be required to attach supporting affidavits and documents to any allowed briefs, along with a full explanation in the brief of the material's relevance to the issues and matters in dispute.²⁴⁸ Such attachments shall have been previously identified in the parties' information designations, but need not have been attached to the complaint, answer, or any necessary

²⁴⁵ See Appendix A, at §§ 1.721(a)(11); 1.724(g); 1.726(d).

²⁴⁶ See Appendix A, at § 1.720(h). See *Tariff Forbearance Order*.

²⁴⁷ See *supra* "Status Conferences, The Initial Status Conference" section.

²⁴⁸ See Appendix A, at § 1.720(h). See *supra*, para. 35.

reply.²⁴⁹ We find that this strikes an appropriate balance between the needs of the Commission and opposing parties to have readily available information and the hardships of producing unnecessary materials. We agree with PTG and USTA that parties may, despite good faith efforts to file complete submissions, later acquire documents or information upon which they wish to rely but which they did not identify as relevant information in their information designations. Therefore we permit a party to attach such subsequently obtained documents, upon which the party intends to rely, to any subsequent brief filed in the matter, provided it is accompanied by a full explanation in the brief of the material's relevance to the issues and matters in dispute and why such material was not identified in the party's information designation.²⁵⁰

89. We disagree with AT&T's suggestion that all document production should occur at the initial status conference, except in Section 271(d)(6)(B) complaints under 90-day resolution deadlines. This document production requirement is intended to work in conjunction with the other requirements adopted in this rulemaking, including the requirement that parties discuss, before the initial status conference, issues such as settlement prospects and stipulations of facts and disputed facts.²⁵¹ It is essential that parties be able to review the documents produced with the initial pleadings in order to meet and discuss these issues knowledgeably prior to the initial status conference. Furthermore, we conclude that requiring the identification of individuals and the identification, inventory, and production of documents will facilitate the staff's ability to require further disclosure of information about individuals with relevant information and/or further production of documents when necessary.

90. We are not persuaded by the arguments of some commenters, such as CBT, NYNEX, PTG, and SWBT, that twenty days is an insufficient amount of time in which to prepare answers with the level of information contemplated under these rules.²⁵² We do not view defendants as having only twenty days in which to prepare their answers. The pleading requirements are intended to work in conjunction with the pre-filing requirements.²⁵³ Thus, by the time parties reach the stage of participating in a formal complaint before the Commission, settlement talks will have narrowed the number and scope of issues in dispute, and parties will have already commenced the collection and/or exchange of relevant information that will be used to substantiate the defendant's answer. We conclude that the imposition of these format and content requirements on defendants is not unduly burdensome, particularly in light of Congress' clear intent to expedite resolution of complaints to promote the competitive goals of the Act.²⁵⁴

91. We also disagree with Bell Atlantic that the information produced would only be useful for depositions or broad document searches, which are seldom permitted by the Commission. Early identification of individuals knowledgeable about the matters in dispute will be an important tool for the parties and the staff, particularly in those cases where additional affidavits or other forms of factfinding

²⁴⁹ See Appendix A, at § 1.720(h). See *Tariff Forbearance Order*.

²⁵⁰ See Appendix A, at § 1.720(h). see *Tariff Forbearance Order*.

²⁵¹ See *supra* "Status Conferences" section.

²⁵² See *supra* "Answers" section.

²⁵³ See *supra* "Pre-filing Requirements" section.

²⁵⁴ See *Joint Explanatory Statement* at 1.

become necessary. Given our experience, and in light of the short complaint resolution deadlines, we conclude that it is necessary and appropriate to require parties to identify knowledgeable individuals and potentially relevant documents early in the complaint process.

92. We also conclude that pleadings filed solely to effect delay in the prosecution or disposition of a complaint are filings for improper purpose within the meaning of Section 1.734 of our rules.²⁵⁵ No commenters opposed this proposal. Adoption of this definition will work in conjunction with the new rules to further deter parties from filing unnecessary pleadings in formal complaints before the Commission.

2. Waivers for Good Cause Shown

a. The Notice

93. In the *Notice*, we recognized that many of the proposed pleading requirements could be burdensome on some individuals or parties, particularly those desiring or compelled to proceed without the assistance of legal counsel due to financial and other reasons. Therefore, we proposed to waive format and content requirements for complaints, answers, and replies upon an appropriate showing of financial hardship or other public interest factors.²⁵⁶ We tentatively concluded that this waiver provision would help to ensure that full effect is given to the provision in Section 208 of the Act that "any person, any body politic, or municipal organization, or State Commission," may complain to the Commission about anything "done or omitted to be done" by a common carrier in contravention of the Act.²⁵⁷ We sought comment on this proposal and tentative conclusion, as well as on what standards should be used to determine "good cause" for waiving format and content requirements.²⁵⁸

b. Comments

94. All parties commenting on this proposal support it. APCC and NYNEX suggest that waivers should be granted primarily for financial hardship or public interest reasons and suggest specific revenue or asset levels to define "financial hardship."²⁵⁹ ATSI argues that complainants alleging violations of Section 260, regarding the provision of telemessaging service, should not have to make special requests to receive good cause waivers.²⁶⁰ GST, KMC, MFS, and USTA suggest that the Commission issue form

²⁵⁵ See Appendix A, § 1.734(c).

²⁵⁶ *Notice* at 20841.

²⁵⁷ 47 U.S.C. § 208.

²⁵⁸ *Notice* at 20841.

²⁵⁹ APCC suggests that financial hardship is shown when a company and its affiliates have gross revenues of less than \$8 million and gross assets of less than \$20 million. APCC Comments at 6. NYNEX suggests that the Commission adopt a presumption that carriers with more than .05% of nationwide telecommunications revenues are not entitled to a waiver. NYNEX Comments at 8.

²⁶⁰ ATSI Comments at 13.

complaints and model pleadings that *pro se* complainants could either fill out or follow.²⁶¹ GTE warns against routine granting of waivers.²⁶² The NAD suggests establishing an ombudsman within the Commission to assist with accessibility complaints.²⁶³

c. Discussion

95. We conclude that parties may petition the staff for waivers of the format and content requirements for complaints, answers, and any authorized replies.²⁶⁴ Such waiver requests shall be considered on a case-by-case-basis and may be granted upon an appropriate showing of financial hardship or other public interest factors.²⁶⁵ We note this waiver provision will work in conjunction with the Commission's existing general authority to waive any provision of the rules on its own motion or on petition if good cause is shown.²⁶⁶ The discretion to grant waivers of the format and content requirements based on financial hardship and other public interest factors will ensure, pursuant to Section 208, that "any person" has the right to complain to the Commission about acts or omissions by a carrier that contravene the Act. For this reason, we do not agree with APCC or NYNEX that financial hardship should be determined solely based on set revenue or asset levels. The range of potential complainants under Section 208 is broad and may include individuals, state commissions, municipalities, associations, and other entities of all forms and sizes. Likewise, the size and makeup of defendant carriers will vary greatly. Thus we conclude that waiver determinations should be made on a case-by-case basis. The Commission shall make every effort to apply its discretion in a consistent and fair manner to strike an appropriate balance between strict compliance with the rules and the needs of certain parties for more lenient requirements and timetables. Furthermore, the Commission shall have discretion to waive or modify some or all of its rules as appropriate when a waiver is granted for good cause shown. For example, if the Commission grants a waiver of the document production requirements to a party who demonstrates financial hardship, the Commission may establish an appropriate alternative method for review and production of documents in that matter.

96. We find that Section 1.721(b) of the rules contains a suggested format for formal complaints that is clear and explicit and that no further form complaints or model pleadings for *pro se* complainants are necessary.²⁶⁷ Furthermore, the Enforcement Division of the Common Carrier Bureau currently provides, via the Internet, direct mailings, and public reference room access, a fact sheet designed to instruct consumers on how to file a formal complaint with the Commission. Finally, we conclude that

²⁶¹ GST Comments at 9 n.7; KMC Comments at 9; MFS Comments at 9; USTA Comments at 4.

²⁶² GTE Comments at 8.

²⁶³ NAD Reply at 6.

²⁶⁴ See Appendix A, §§ 1.721(d); 1.724(j); 1.726(f).

²⁶⁵ See Appendix A, §§ 1.721(d); 1.724(j); 1.726(f).

²⁶⁶ See 47 C.F.R. § 1.3.

²⁶⁷ 47 C.F.R. § 1.721(b)

the range of subjects that could conceivably be contained within a pleading is too broad for a model pleading form to be of much utility to *pro se* parties.

97. We decline to address in this proceeding NAD's proposal to establish a Commission ombudsman to assist with accessibility complaints in this proceeding. Such a proposal should be addressed in our Section 255 implementation rulemaking,²⁶⁸ so as to permit the Commission to take a comprehensive approach to implementation of Section 255.

F. Answers

1. Reduction of Time to File Answers

a. The Notice

98. In the *Notice* we proposed to reduce the permissible time for a defendant to file an answer to a complaint from thirty to twenty days after service or receipt of the complaint.²⁶⁹ We tentatively concluded that this reduction was consistent with the changes we proposed regarding the form and content of pleadings and would not unduly prejudice the rights of any defendant.²⁷⁰ We further tentatively concluded that this reduction in time to answer struck the appropriate balance in distributing the burdens of compliance with the new formal complaint resolution deadlines among the complainants, defendants and the Commission.²⁷¹

b. Comments

99. The majority of commenters, including AT&T, Bell Atlantic, CBT, CompTel, the cable entities, MCI, TRA, and USTA support this proposal.²⁷² Ameritech, BellSouth, GTE, PTG, and SWBT contend, however, that because complainants will have months to prepare their complaints, requiring defendant carriers to submit detailed responses with full legal and factual support within a twenty day window would be unfair and unreasonably burdensome in most cases.²⁷³ PTG suggests that defendants be required to file their answers within twenty days only in complaints filed pursuant to Section

²⁶⁸ See Section 255 NOI.

²⁶⁹ Notice at 20842.

²⁷⁰ Notice at 20842.

²⁷¹ Notice at 20842.

²⁷² See, e.g., AT&T Comments at 11; CBT Comments at 9; CompTel Comments at 6; cable entities Joint Reply at 8; MCI Comments at 17; TRA Comments at 15.

²⁷³ Ameritech Reply at 9-10; BellSouth Comments at 14; GTE Comments at 4; PTG Comments at 14; SWBT Comments at 4-5.

271(d)(6)(B).²⁷⁴ ACTA and USTA suggest that defendants be permitted to supplement their answers at a later time.²⁷⁵

c. Discussion

100. We conclude that a defendant shall be required to file its answer to a complaint within twenty days after receipt of service of the complaint by the complainant.²⁷⁶ We find that reducing the time in which to file an answer is necessary in light of the Congressional intent to expedite the resolution of complaints alleging anti-competitive behavior by defendant carriers.²⁷⁷ We disagree with commenters who assert that defendant carriers will be overly burdened by having to file answers that comply with the format and content requirements within twenty days from the date of service.²⁷⁸ As stated earlier, we view the defendants as having far more than twenty days in which to prepare their answers because the pre-filing and format and content requirements adopted in this proceeding are intended to work in conjunction with the reduction in time to file an answer.²⁷⁹ The pre-filing requirements will alert the defendant as to the basis of the dispute. The actions taken by a defendant in participating in good faith settlement negotiations should require the same collection of information and documents that will be necessary to support its answer in compliance with the format and content requirements. The requirement of fully supported and thoroughly prepared complaints, furthermore, will facilitate a defendant carrier's ability to prepare a full response to a complaint within the twenty day period. Such pre-filing and format and content requirements will eliminate any need to allow defendants to supplement their answers. Permitting defendants to supplement their answers routinely would only encourage defendants to submit incomplete answers.

G. Discovery

101. The *Notice* sought comment on a variety of ways to modify the discovery process in light of the new statutory deadlines. Discovery is inherently time-consuming and often fails to yield information that aids in the resolution of a complaint. The *Notice*, in conjunction with other proposals designed to improve the content and utility of the complaint, answer, and related pleadings, sought comment on discovery proposals that would balance the parties' legitimate need for discovery with the twin goals of (1) meeting statutory resolution deadlines, and (2) facilitating prompt resolution of all formal complaints.²⁸⁰

²⁷⁴ PTG Comments at 17.

²⁷⁵ ACTA Comments at 5; USTA Comments at 4.

²⁷⁶ See Appendix A, § 1.724(a).

²⁷⁷ See *Joint Explanatory Statement* at 1.

²⁷⁸ See *supra* "Format and Content" section.

²⁷⁹ See *supra* "Format and Content" section.

²⁸⁰ *Notice* at 20842-20847.

1. Permissible Requests for Discovery

a. The Notice

102. In our experience, discovery has been the most contentious and protracted component of the formal complaint process. In the *Notice*, we stated that one of the key elements to streamlining the enforcement process was to maximize staff control over the discovery process.²⁸¹ We stated our intention to examine carefully what role, if any, discovery should continue to play in resolving formal complaints, and sought comment on a range of options to either eliminate or modify the current discovery process.²⁸²

103. For our first approach, we sought comment on the benefits and drawbacks of eliminating the self-executing discovery permitted under our current rules by prohibiting discovery as a matter of right.²⁸³ This proposal placed the emphasis of developing facts and arguments at the complaint and answer stages of the proceeding, rather than on discovery and subsequent briefing opportunities.²⁸⁴ Under this proposal, if the record presented through such pleadings failed to provide a basis for resolving disputes over material facts or was otherwise insufficient to permit our resolution of a complaint, the staff would have the discretion to authorize limited discovery at the initial status conference, that would be held shortly after receipt of the defendant's answer to the complaint.²⁸⁵ We sought comment on various aspects of eliminating automatic discovery, including whether discovery was necessary in all cases, whether such a rule would pose a hardship for any particular segment of complainants, and what standards should apply in the event that discovery was authorized by the staff.²⁸⁶

104. For our second alternative approach, we sought comment on the benefits and drawbacks of a proposed rule that would limit self-executing discovery to something other than the thirty written interrogatories authorized under the current rules.²⁸⁷ We asked parties to comment on whether a more limited form of discovery as a matter of right would accommodate a party's ability, where necessary, to identify and present to the Commission material facts that may be in the possession or control of the other party; whether allowing a limited amount of discovery as a matter of right might decrease the staff's burden in deciding discovery requests on a case-by-case basis; and whether limiting discovery in this manner would detract from full compliance with our rules regarding the level of detail that should be

²⁸¹ *Notice* at 20842.

²⁸² *Notice* at 20843-20847.

²⁸³ *Notice* at 20843.

²⁸⁴ *Notice* at 20843.

²⁸⁵ *Notice* at 20843.

²⁸⁶ *Notice* at 20843.

²⁸⁷ *Notice* at 20843.

offered in support of complaints and answers.²⁸⁸ Pursuant to this approach, the staff would permit additional discovery only in extraordinary cases.²⁸⁹ We sought comment on various aspects of this approach, including whether a reduction in the number of allowable written interrogatories would be appropriate, and whether interrogatories should be limited to questions designed to illuminate specific factual assertions or denials.²⁹⁰

105. In our third alternative approach, we sought comment on continuing to allow some limited discovery as a matter of right, but allowing Commission staff to set limits on the scope of that discovery and to set specific timetables for such discovery.²⁹¹ We noted that authorizing the staff to limit the scope of the written interrogatories could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes.²⁹² In conjunction with this approach, we proposed to require that objections to interrogatories be filed by the date of the initial status conference, thereby enabling staff to rule on such objections at that time.²⁹³ We noted that under this proposal, extensions of time to initiate limited discovery and file objections and motions to compel would be granted only in extraordinary circumstances.²⁹⁴

b. Comments

106. The majority of commenting parties argue that the Commission should continue to allow discovery as a matter of right.²⁹⁵ CBT, ICG, and MCI argue that eliminating discovery as a matter of right will cause delay due to the fact that motions requesting discovery will almost always be filed and ICG argues further that such motions may produce inconsistent discovery rulings.²⁹⁶ PTG argues that the prohibition of discovery would inhibit the development of facts.²⁹⁷ Bechtel & Cole argue that the right

²⁸⁸ Notice at 20844.

²⁸⁹ Notice at 20844.

²⁹⁰ Notice at 20844.

²⁹¹ Notice at 20844-45.

²⁹² Notice at 20844.

²⁹³ Notice at 20844.

²⁹⁴ Notice at 20844-45.

²⁹⁵ See, e.g., APCC Comments at 5; ACTA Comments at 6; Bechtel & Cole Comments at 2-3; CBT Comments at 10; CompTel Comments at 6; GST Comments at 9-10; GTE Comments at 10; KMC Comments at 10; MCI Comments at 17-18; MFS Comments at 9-10; Nextlink Comments at 6; PTG Comments at 18; TRA Erratum at 16; TCG Comments at 3; USTA Comments at 5; U S West Comments at 10.

²⁹⁶ CBT Comments at 11; ICG Comments at 16; MCI Comments at 18.

²⁹⁷ PTG Comments at 18.

to discovery is necessary because defendants have the power to protect information in their sole possession.²⁹⁸ APCC, CompTel and TRA argue that discovery is especially necessary where the defendant has sole possession of the information a complainant needs to make its case, such as in the case of allegations of cross-subsidies or discrimination.²⁹⁹ ACTA and CompTel argue that due process requires that a complainant be able to direct its case as it sees fit.³⁰⁰

107. Parties objecting to the elimination of discovery as a matter of right propose several ways to streamline the discovery process. PTG and TCG suggest that the Commission could limit discovery to twenty written interrogatories, while USTA and GTE suggest that fifteen interrogatories would be the appropriate number.³⁰¹ The cable entities, however, suggest allowing thirty discovery requests, including interrogatories, requests for production of documents, and requests for physical inspection of materials and facilities, to be filed ten days after service of the complaint, an additional fifteen such discovery requests to be filed within five days of the filing of the answer, and allowing parties to request additional discovery thereafter.³⁰² The cable entities argue that the certainty of prompt resolution of discovery disputes will discourage parties from making frivolous requests or objections.³⁰³

108. A number of the parties that oppose the elimination of discovery as a matter of right suggest that discovery disputes should be resolved at the initial status conference.³⁰⁴ Several parties argue that it would be useful for Commission staff to use the initial status conference to control the scope and/or scheduling of discovery.³⁰⁵ U S West and TRA, however, argue that discovery should be limited by the staff only with regard to timetables.³⁰⁶ TRA states that even Rule 26 of the FRCP provides for traditional discovery, in addition to voluntary disclosure, and states further that Commission staff should not control the prosecution of an action.³⁰⁷ MCI suggests that requiring discovery to be discussed at the initial status conference will help Commission staff maintain control over the discovery process,³⁰⁸ although MCI

²⁹⁸ Bechtel & Cole Comments at 3.

²⁹⁹ APCC Comments at 4; CompTel Comments at 6; TRA Comments at 16.

³⁰⁰ ACTA Comments at 6; CompTel Comments at 6.

³⁰¹ PTG Comments at 18; TCG Comments at 4; USTA Comments at 5; GTE Comments at 10.

³⁰² Cable Entities Reply at 2-3, 11.

³⁰³ Cable Entities Reply at 3.

³⁰⁴ PTG Comments at 19; TCG Comments at 4; ICG Comments at 9; KMC Comments at 11; MCI Comments at 19; MFS Comments at 11.

³⁰⁵ PTG Comments at 19; CBT Comments at 11 (arguing that it is the breadth and relevance of discovery that causes delay); USTA Comments at 15; TCG Comments at 4; TRA Erratum at 19; Sprint Comments at 8.

³⁰⁶ TRA Comments at 17; US West comments at 10.

³⁰⁷ TRA Comments at 17.

³⁰⁸ MCI Comments at 19.

asserts that the proposed timing of the initial status conference is too early in formal complaint proceedings to rule on objections to discovery.³⁰⁹

109. To promote the resolution of discovery disputes at the initial status conference, several parties argue that discovery requests and objections thereto should be served and filed prior to the initial status conference.³¹⁰ MCI argues, however, that it would be unfair to complainants to require discovery requests to be filed with complaints and answers because the defendants would be able to formulate their requests after seeing the complaint, while the complainants would be required to formulate their requests prior to seeing the answer.³¹¹ CompTel argues that the proposed timetables for objecting to interrogatories provides insufficient time for parties to review the interrogatories, and that therefore parties will always file objections to interrogatories rather than answer them.³¹² CompTel suggests instead that parties be required to respond promptly to interrogatories for which their objections are denied.³¹³ While they support retaining discovery as a matter of right, GST, KMC and MFS argue that interrogatories should be prohibited or limited because they are often useless.³¹⁴ If allowed, interrogatories should not be served until after the parties file their joint statement of stipulated facts and key legal issues, to facilitate the targeting of disputed areas.³¹⁵ APCC suggests that the Commission require early discovery, including expedited rulings on discovery disputes.³¹⁶

110. GTE, MCI, Nextlink and TCG argue that discovery as a matter of right is necessary because all prior disclosures are "voluntary" and parties would disclose only those facts solely in their possession that are most favorable to their case.³¹⁷ ICG argues that the absence of discovery as a matter of right would preclude parties from checking the accuracy of their opponent's disclosures.³¹⁸ TRA is concerned that elimination of discovery as a matter of right would result in fewer complaints being filed with the Commission because injured parties would lack access to information.³¹⁹

³⁰⁹ MCI Comments at 20

³¹⁰ ACTA Comments at 6; Sprint Comments at 8; ICG Comments at 16.

³¹¹ MCI Comments at 13.

³¹² CompTel Comments at 7.

³¹³ CompTel Comments at 7.

³¹⁴ GST Comments at 10; KMC Comments at 10; MFS Comments at 10.

³¹⁵ GST Comments at 10.

³¹⁶ APCC Comments at 5.

³¹⁷ GTE Comments at 10; MCI Comments at 19; Nextlink Comments at 5-6; TCG Comments at 3.

³¹⁸ ICG Comments at 15.

³¹⁹ TRA Reply at 5.

111. AT&T, BellSouth, NYNEX, and SWBT argue that there should be no discovery as a matter of right.³²⁰ AT&T argues that abuses will continue to occur if parties are entitled to a fixed number of interrogatories.³²¹ BellSouth argues that full discovery is always available in federal court.³²² MCI counters this argument by asserting that discovery should not be the exclusive province of federal courts because courts often make primary jurisdiction referrals to the Commission in Section 207 cases.³²³ SWBT's support of the elimination of discovery is contingent upon two requirements: (1) providing defendants with the right to remove a formal complaint proceeding to federal court, and (2) a complete prohibition on motions for discovery to prevent the routine filing of such motions.³²⁴ TRA opposes SWBT's suggestion that the Commission provide defendants with the right to remove formal complaints to federal court because it argues that defendants would use such a procedure to their tactical advantage to avoid expedited resolution.³²⁵

112. SWBT argues that discovery is not needed because parties do not have a right to file a formal complaint and then use discovery to determine if a claim exists.³²⁶ SWBT suggests that parties be required to certify that they engaged in good faith discovery discussions and exchanges prior to the filing of the complaint.³²⁷

113. AT&T and NYNEX argue that the Commission should control all discovery, including the scope, timing and number of interrogatories, and issue discovery rulings at the initial status conference.³²⁸ NYNEX proposes that parties be required to propound up to thirty interrogatories with the complaint and answer and file any opposition to such discovery five days prior to the initial status conference.³²⁹ AT&T argues that discovery requests in addition to interrogatories should be (1) only allowed in extraordinary circumstances, (2) requested at the initial status conference, and (3) discussed with the opposing party prior to the filing of the motion requesting such discovery, with any opposition to such motion due in five days.³³⁰

³²⁰ AT&T Comments at 15-17; BellSouth Comments at 15-16; NYNEX Comments at 9; SWBT Comments at 6.

³²¹ AT&T Comments at 15 n.4.

³²² BellSouth Comments at 15-16.

³²³ MCI Comments at 14.

³²⁴ SWBT Comments at 6.

³²⁵ TRA Reply at 5.

³²⁶ SWBT Reply at 2.

³²⁷ SWBT Comments at 6.

³²⁸ AT&T Comments at 15-16; NYNEX Comments at 19.

³²⁹ NYNEX Comments at 10.

³³⁰ AT&T Comments at 17.